CASE NO. 82-1335

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES A. RHODES, et al.,

Petitioners

vs.

LARRY STEWART, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S MEMORANDUM OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In May of 1976, Respondents, who were incarcerated under the jurisdiction of Petitioners, made known their desire to subscribe to Hustler Magazine. The prisoners were informed that subscriptions to Hustler Magazine were not permitted for inmates and that any issues of Hustler Magazine received in the institution mail room would be returned to the publisher or destroyed. This was said to be a matter of policy in the Ohio Department of Rehabilitation and Corrections. No hearing on Respondents' request was ever held. In addition, no reason other than "departmental policy" was advanced to support Petitioners' rejection of Respondent's request.

On January 17, 1978, Respondents filed an action against Petitioners seeking a declaratory judgment and injunctive

relief. The gravamen of this action was that the Petitioners had arbitrarily denied the right of Respondents to read Hustler Magazine because of a "departmental policy" that the magazine was obscene, per se. Respondents asked for a judgment declaring that the policies and the practices of the Petitioners violated Respondents' constitutional rights and for injunctive relief.

After depositions of the members of the Periodical Screening Committee of the Department of Corrections were taken, the parties entered into an extensive stipulation of facts. The case was submitted to the trial court on the depositions and the extensive stipulations.

The District Court rendered an Opinion and Order on February 23, 1981, finding that

> it is undisputed that the [Petitioners] did not operate according to [their own] regulations in determining whetner to ban Hustler Magazine from the prison population in May of 1976. Nor did the [Petitioners] follow their own regulations in determining that Hustler Magazine is obscene.
>
> [Opinion and Order, District Court (Appendix p. A-30, 31)].

Contrary to the suggestion in the Petition for Writ of Certiorari, the regulation referred to in the Petition was not effective at the time the acts complained of occurred in May of 1976. The parties had stipulated that the original regulation was unconstitutional in that it did not properly define obscenity. The District Court expressly found:

> 5. Since May of 1976, [Respondents] have sought to acquire Hustler Magazine but were denied permission as a matter of Department of Rehabilitation and Correction policy . . .

> 6. Prior to May of 1976, inmates were permitted to receive Hustler. On May 27, 1976, the publication screening committee voted to remove Hustler from the list of permitted publications and to review the magazine on a monthly basis. Since May of 1976, inmates at all penal institutions within the State of Ohio have not been permitted to receive Hustler.
>
> [Opinion and Order, District Court (Appendix p. A-23, 24)]

The District Court entered a judgment which was ultimately for the benefit of all persons incarcerated under the authority of the Ohio Department of Rehabilitation and Correction who had a desire to read Hustler Magazine. Prior to the entry of judgment in February of 1981, both Respondents had been released from confinement. Therefore, Judge Duncan granted a post-judgment request made by the parties jointly that the Order be amended so that the injunctive relief would thereafter become effective upon the request of a party not origi-

nally named as a Plaintiff. [Order, District Court, April 1, 1981 (Appendix A-19)].

The conduct of the Petitioners in excluding Hustler Magazine from the penitentiary system continued from May of 1976 through August of 1978. The parties selected this cut-off date for practical litigation reasons:

> For purposes of this litigation, the final issue being raised in question is the August 1978 issue so that final dispositions may be had and the matters resolved. [Opinion and Order (Appendix A-27,28)].

As found by the District Court, these decisions were based upon the belief of the Committee that the publications were obscene and therefore prohibited pursuant to Regulation 5120-9-19(F)(1) of the Department of Rehabilitation and Correction. Thus, the offending conduct continued well after the suit was filed

and over a year after the new regulation was adopted.

SUMMARY OF RESPONDENTS' ARGUMENT

Petitioner has misconstrued the facts of the case in order to induce a writ of certiorari. The Respondents, on their behalf and on behalf of other inmates, obtained declaratory and injunctive relief vindicating their constitutional right to read any matter not inconsistent with penological objectives.

The Petitioners failed to prove that Hustler had been lawfully placed on the "not permitted" list. The district court found that the exclusion of Hustler was unlawful, arbitrary, and in disregard of Petitioners' own regulations.

Correctly understood, the decision of the district court on the fee application

and the decision of the court of appeals are consistent with decisions of this court and other courts which have liberally construed the phrase "prevailing party" to include civil rights plaintiffs who succeed in vindicating important constitutional rights. As a practical matter, Petitioners lost and the Respondents prevailed.

ARGUMENT AGAINST GRANTING CERTIORARI

A. Petitioner has Misstated Relevant Facts

Petitioners contention that the Decision in this case is in conflict with Decisions of this Court and with Decisions of other Cricuit Courts of Appeal is based upon an incorrect statement of facts. Petitioners statement

that at the time the instant action was commenced "the Ohio Department of Rehabilitation and Correction was screening publications under a constitutionally sound policy" (Petition for Writ of Certiorari, p. 8) is both disputed and not true. The District Court expressly found that Petitioner had consistently failed to comply with constitutional mandates in arbitrarily banning Hustler. [Opinion and Order, District Court, (Appendix A-30, 31)].

> It is clear that the defendants have not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates.
>
> [Opinion and Order, District Court (Appendix A-30, 31)]

This express finding by the District Court was not appealed. Petitioners' attempt to collaterally attack this finding was also made, unsuccessfully, in the Sixth Circuit Court of Appeals.

> The trial court found, on stipulated facts, that the defendants had not implemented their own applicable regulations in proscribing Hustler as obscene . . . No appeal was taken from this order. Accordingly, no issue with regard to the validity of the order is before this Court.
>
> [Order, Sixth Circuit Court of Appeals (Appendix A-4)]

Petitioners denied that their activities violated the constitutional rights of the Respondents, but they failed to prove that the magazine was permanently banned for reasons consistent with constitutional principles. Petitioners simply lost their case. The district court then ordered that the regulation be followed, as it had not been, and further ordered that the magazine not be barred unless and until Petitioners complied with the District Court's Opinion and Order (Appendix A-31). This judgment of the District Court was not appealed by Petitioners.

The manner in which Respondents prevailed in the District Court, and obtained practical relief, is clearly demonstrated by reviewing the procedure employed by the Petitioners prior to this action to ban Hustler with the requirements imposed by the District Court.

The constitutionally improper manner in which Petitioners banned Hustler, prior to this action, is revealed in the District Court's Findings of Fact Numbers 7-13. (Appendix A-24, 25, 26). The District Court found that Petitioners had failed to comply with the constitutionally required procedural and substantive standards in determining to ban Hustler. [Appendix A-31]. This was the procedure employed by Petitioners in banning Hustler:

> No appeal from the Publication Screening Committee exists in the case of a publication placed on the "not permitted" list. No hearings of any type were con-

ducted by the Publication Screening Committee or the Department prior to placing Hustler on the "not permitted" list.

[Opinion and Order (Appendix p. A-27)]

Contrast this with the requirements imposed by the District Court.

IT IS ORDERED AND ADJUDGED THAT: the defendants, upon request by the plaintiffs or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive Hustler, the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decisionmaker to determine whether Hustler may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-10(F) and (6) in implementing this judgment.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in Pell v. Procunier, supra; Guajardo v. Estelle, supra, and the opinion and order in this action.

The defendants are ordered to hold a hearing and render a

decision within thirty (30) days of the date of the request.

[Judgment, District Court (Appendix A-17)]

Petitioners' argument that the District Court passed on the constitutionality of the "new" regulation is both specious and irrelevant. After reviewing the newly adopted regulation, the District Court found that three procedural requirements were indeed encompassed in the new regulation, but concluded:

> However, it is undisputed that the defendants did not operate according to these regulations in determining whether to bar Hustler from the prison population in May, 1976. Nor did the defendants follow their own regulations in determining that Hustler is "obscene". . .
>
> It is clear that the defendants have not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates.

Petitioners' argument is irrelevant because the court found that both regulations had been ignored between May of 1976 and August of 1978 when the case was submitted.

Petitioners also argue that the district courts' decision merely "maintains the status quo". This argument disregards the obligatory and commanding character of Judge Duncan's Order. The Order subjects Petitioners to enforcement by contempt of court proceedings, and, as amended, makes the relief of the Order available to any prisoner seeking to receive Hustler. The Order represents a total change in the status quo.

B. No Conflict With Decisions of this Court

For the reasons stated by the courts below, the award of attorneys fees is

consistent with Hanrahan v. Hampton, 446 U.S. 754 (1980) (per curiam) because the inmates alleged and proved that exclusion of Hustler was unlawful and arbitrary since the defendants had disregarded their own regulations. Not only were the defendants ordered to comply with regulations they had previously ignored, they were also enjoined from banning Hustler except for reasons consistent with penological objectives as established by courts of the United States in earlier prisoners' rights cases.

On appeal, the Sixth Circuit Court of Appeals correctly interpreted and applied Hanrahan v. Hampton, supra, and its own earlier decision in Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. den'd. 447 U.S. 911 (1980). The "practical manner" standard of Northcross was met since the inmates were awarded a declara-

tory judgment that the regulation had been ignored, and that, even if followed, it had to be applied in a manner consistent with penological objections.

This Court has repeatedly emphasized that the award of attorneys' fees for successful prosecution of actions to vindicate civil rights is to be the rule unless special circumstances would render such an award unjust. Newman v. Piggie Park Enterprises, 390 U.S. 400, 19 L. Ed.2d 1263, 88 S. Ct. 964 (1968) and Roadway Express, Inc. v. Piper, Jr., 447 U.S. 752, 65 L. Ed.2d 488, 100 S. Ct. 2455 (1980).

Whether the Publications Screening Committee followed either A.R. 5120-9-19 or its predecessor and applied them in a manner consistent with penological objectives were the only significant issues the district court reached below.

On those issues, the Respondents undeniably prevailed, and the Petitioners lost.

The District Court, in awarding Respondents attorneys fees, summarized its conclusion that Respondents were prevailing parties:

> However, the Court held that the defendants had not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates. Nor had the defendants attempted to follow their own administrative regulations providing a procedure for protecting the rights of the inmates in this regard. Accordingly, the Court ordered the defendants to provide the plaintiffs with notice, an opportunity to be heard, and an ultimate determination by a disinterested decision-maker on the question.
>
> Under the circumstances, the plaintiffs have clearly prevailed in this lawsuit.
>
> [Memorandum and Order, June 3, 1981 (Appendix 10)]

The Sixth Circuit Court of Appeals agreed that Respondents were indeed prevailing parties.

> Applying the pronouncements of Northcross, plaintiffs below have prevailed in a practical manner in that they were afforded the right to a determination under regulations the defendant had previously ignored. Moreover, they became entitled to that determination within 60 days of a request for such a determination, which time period is not mandated by the regulations.
>
> [Order, Sixth Circuit (Appendix A-5, 6)]

The Decision of the Sixth Circuit in the instant case is not in conflict with Decisions of this Court or with Decisions of other Circuit Courts of Appeal. As previously discussed, Petitioners contention to the contrary is founded upon Petitioners attempt to alter the facts found by the District Court, and with respect to which no appeal was taken.

There is no merit in petitioner's argument that the inmates "position" had been unchanged by the decision. The state recognized the propriety of the judgment based upon stipulated facts and

did not move to dismiss the case after termination of the Plaintiff's incarceration. The state did not appeal the judgment on the ground that the request for relief was moot. Indeed, the order was later amended to grant class-wide relief upon joint motion of the parties (A-19).

The vindication of rights by the plaintiff is the touchstone of 42 U.S.C. §1988, not the monetary or other intrinsic value of the relief obtained, as this Court suggested in discussing legislative history in Hanrahan, supra at 674. The right to due process and no more censorship than necessary to meet legitimate penological objectives are very substantial rights of inmates, and the District Court's order vindicates them.

Because of this proper emphasis on the vindication of civil rights,

petitioner's argument that no case or controversy existed is also without merit. Notwithstanding the failure to raise this issue earlier, the scope of the declaratory and injunctive relief extends to all inmates. Assuming arguendo, that Ashcroft v. Mattis, 431 U.S. 171 (1977) has some relevance to this case, the decision involved "present rights" of other inmates, and the standard of Ashcroft is therefore met.

Similarly, no argument was raised below concerning whether the Plaintiffs were only successful on some but not all issues. Even if it were proper to assume the outcome of this Court's deliberations on Hensley v. Eckerhart, 664 F.2d 294 (8th Cir. 1981) cert granted, ___ U.S. __ 71 L.Ed.2d 847 (1982), there is no apparent conflict between the Eighth Circuit and the Sixth Circuit with respect to this judgment. Petitioner

does not suggest any issue upon which the inmates failed. The only issue reached by the District Court was the "unlawful and arbitrary exclusion of Hustler". That Plaintiffs had not get all the relief they originally demanded does not mean they failed on some legal issue in the case.

C. No Conflict with Other Circuits

The determination that these inmates succeeded in vindicating their constitutional rights and are therefore "prevailing parties" for purposes of 42 U.S.C. §1988 is consistent with every reported circuit decision on this issue. Petitioner makes no meritorious argument that the appellate court disregarded or misunderstood any controlling precedent. The appellate court did not distinguish or name any inconsistent authority. The formulation of the Sixth Circuit in

Northcross, supra, applied and followed here, does not differ materially from Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980). One need look no further than the stipulated facts to conclude that existence of a right to procedural due process and substantive constitutionality was properly established in favor of the inmates by the judgment.

On this central issue the inmates prevailed, and the petitioners lost, not because they were "informed" of a right to an appeal, but because the court found that the regulation had been ignored. This finding and the order to comply with the regulation is the "establishment of a right or proscription of a wrong" under the Smith formulation.

Petitioners' argument premised on Harrington v. Vandalia Butler Board of Education, 585 F.2d 192 (6th Cir. 1978),

cert. den'd, 441 U.S. 932 (1979) is inapposite. In Harrington, the plaintiff teacher was found to have no cause of action supporting any form of relief under the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-5(k) (1976) at the time she brought her suit, even though the district court found that her rights had been violated. Consequently she was not a "prevailing party." In contrast, disregard of both the old and new regulations and the arbitrary exclusion of Hustler did establish a cause of action in the inmates at the time suit was filed which entitled them to relief. Petitioners fail to see this compelling distinction or grasp its significance.

D. Importance of the Issues

The determination of a prevailing party is undeniably an important and significant issue in civil rights fee

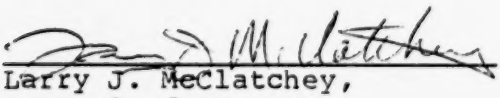
litigation. The circuits have various formulations of "prevailing party", but these inmates would have succeeded under the rule of any other circuit. There is uniformity in application of the principle as established by Newman v. Piggie Park Enterprises, supra, that a prevailing party is to recover fees absent special circumstances. There is consistency in focus on the vindication of the right at issue as the fundament for the award of fees.

The legislative history of 42 U.S.C. §1988 is quite clear in directing the courts to construe the statute broadly in order to encourage the prosecution of civil rights litigation by "private attorneys general". Indeed, the act should be liberally construed to achieve the public purposes sought to be served by statute. The decisions of the district court and the appellate court carry out these purposes.

E. Conclusion

The decision in this case is consistent with both of these principles. Significance of the attorneys fee question, in the abstract sense, does not justify the requested writ. Consequently, there is no compelling issue raised in this case which would justify a writ of certiorari and the Petitioners' motion should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Respondent's Memorandum Opposing Petition for Writ of Certiorari was served upon Anthony Celebrezze, Attorney General of the State of Ohio and Allen P. Adler, Counsel of Record for Petitioners, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215 by regular U.S. mail, postage prepaid, this 26th day of April, 1983.

Larry J. McClatchey